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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Microsoft Corporation

Serial No. 78228227

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112 (Janice O'Lear, Managing Attorney).

Before, Hairston, Rogers and Zervas, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

An application has been filed by Microsoft Corporation
to register the mark KAMEO for goods which were ultimately
identified as follows:

Toys and games, namely, action figures and
accessories therefore; balloons; bathtub toys;
toy building blocks; play cosmetics for children;
costume masks; miniature die cast vehicles; toy
airplanes and helicopters; battery operated
remote controlled toy vehicles; flying discs;
inflatable vinyl figures; jigsaw puzzles; kites;
marbles; indoor slumber and play tents; plush
toys; hand-held puppets; sit-in and ride-on toy

vehicles; train sets; play shaving kits; skateboards; roller skates; toy banks; water squirting toys; toy pistols; Christmas tree ornaments; pinball and arcade game machines; hand-held units for playing electronic games; model craft kits of toy figures; playground balls; sport balls; basketballs; golf balls; golf ball markers; tennis balls; baseballs; rubber action balls; rubber sports balls; rubber playing balls; squeezable balls used to relieve stress; bags for carrying golf equipment; bags for carrying basketball equipment; bags for carrying baseball equipment; bags for carrying tennis equipment; manipulative puzzles and construction toys; crib mobiles; mobiles for children; target sets consisting of a target, rubber suction darts and toy dart gun; playing cards; all sold to promote videogames and videogame characters.¹

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to the identified goods, so resembles the mark CAMEO, which is registered for "equipment sold as unit for playing a board game,"² as to be likely to cause confusion, mistake, or deception.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

¹ Serial No. 78228227, filed March 20, 2003, which is based on a bona fide intention to use the mark in commerce.

² Registration No. 2,327,262 issued March 7, 2000; Section 8 and 15 affidavit accepted and acknowledged, respectively.

Preliminarily, we must discuss two evidentiary matters. With its appeal brief, applicant submitted printouts from the website "wikipedia.org" which contain information about the "Cranium" board game. Applicant submitted these printouts to support its contention that there is no likelihood of confusion in this case because registrant actually uses the cited mark for a type of card in registrant's "Cranium" board game, rather than on the goods set forth in the registration.

The examining attorney has objected to the printouts arguing they were untimely submitted. We note, however, that applicant, in both its March 30, 2005 response to the examining attorney's second Office action, and June 8, 2005 request for reconsideration, discussed the exact information that is shown in the printouts and referenced the website address. The examining attorney, in her responses, did not advise applicant that actual printouts of the website should be submitted. Instead, the examining attorney merely rejected applicant's contention that there is no likelihood of confusion in this case because registrant actually uses the cited mark for a type of game card. By treating the information at the website to be of record, the examining attorney has waived any objections to consideration of this information. Further, although the

printouts of the website were untimely filed, because they contain the exact information relied on by applicant and considered by the examining attorney, we have considered them for whatever probative value they may have. We discuss applicant's argument in this regard in more detail, infra.

Also, in its appeal brief, applicant referred to three "allowed" applications which it owns for the mark KAMEO for videogames and other goods. Applicant pointed out that the toys and games in the instant application are merchandising goods which will be sold to promote the videogame and other goods in the allowed applications.

The examining attorney has objected to applicant's reference to the allowed applications, arguing that this reference is untimely and that actual copies of the applications should have been made of record. We note that the objection to the reference is more properly an objection to material never made of record, rather than to an untimely submission, insofar as applicant has not actually submitted copies of the applications. We also note, however, that applicant first made reference to these applications in its June 8, 2005 request for reconsideration. The examining attorney, in her responsive Office action, did not advise applicant that the

applications had not been made of record or that copies of the applications should be submitted. Moreover, applicant has taken the position throughout the prosecution of this application (and indeed amended the identification of goods to so reflect) that the toys and games in the involved application will be used to promote its videogames and other products. We do not view applicant's mere reference to the applications covering its videogames and other products as a situation that would require that actual copies of the applications be submitted. Thus, the examining attorney's objection to applicant's reference in its brief to these allowed applications is overruled. The reference, nonetheless remains merely part of a line of argument and is not itself evidence. We discuss the argument in more detail, *infra*.

We turn then to the issue of likelihood of confusion. Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis,

two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn first to a consideration of the marks. With respect to the marks, we must determine whether applicant's mark and registrant's mark, when compared in their entireties are similar or dissimilar, in terms of sound, appearance, connotation and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). When marks are, as in this case, phonetically identical, that can be significant. See *TBC Corpo. V. Holsa*, 126 F.3d 1470, 44 USPQ2d 1315 (Fed. Cir. 1997). See also, *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 ("Despite specific differences in spelling and in probable meaning, the dominant factor for consideration is the likelihood of confusion arising from the similarity in sound of the two words when spoken.") In addition, "the PTO may reject an application ex parte solely because of similarity in meaning of the mark sought to be registered with a previously registered mark." In re

Sarkli, Ltd., 721 F.2d 353, 220 USPQ 111, 113 (Fed. Cir. 1983).

The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their commercial impression that confusion as to the source of the goods and/or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975).

We find that the marks KAMEO and CAMEO are substantially similar in terms of appearance, differing by only one letter, and that they are identical in terms of sound. Insofar as the connotation of the marks is concerned, we judicially notice that the word "cameo" is defined as, inter alia, "[a] brief vivid portrayal or depiction". The American Heritage Dictionary of the English Language (4th ed. 2000). Applicant's mark KAMEO, on the other hand, is a coined word with no apparent meaning. However, it could be perceived by purchasers as a fanciful spelling of the word "cameo" and thus would be understood as having the same meaning as the cited mark. In any

event, at the very least, the marks are substantially similar in appearance and identical in sound, and we find that when considered in their entirety, CAMEO and KAMEO project substantially similar, if not identical, commercial impressions.

We turn next to a consideration of the goods. It is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Application of this principle is particularly necessary when, as in this case, the application is based on applicant's intent to use the mark for a wide array of goods, and it cannot be known for what goods applicant would end up actually using the mark. Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that

they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used or intended to be used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991), and cases cited therein. Moreover, the greater the degree of similarity between the applicant's mark and the cited mark, the lesser the degree of similarity between the applicant's goods or services and the registrant's goods or services that is required to support a finding of likelihood of confusion. See In re Shell Oil Co., 992 F.2d 1687 (Fed. Cir. 1993); In re Concordia International Forwarding Corp., 222 USPQ 355 (TTAB 1983).

The examining attorney argues that applicant's toys and games and registrant's equipment sold as a unit for playing a board game are all related because such goods may be sold in the same channels of trade to the same classes of purchasers. The examining attorney submitted copies of four third-party registrations for marks that cover equipment sold as a unit for playing a board game, on the one hand, and some of the toys and games in applicant's application, on the other hand.

Applicant, in urging that the refusal to register be reversed, argues that:

Cited Registration No. 2,327,262 is for the mark CAMEO for equipment sold as a unit for playing a board game. The CAMEO mark is used as the name for a type of card used in the game sold under the Registrant's CRANIUM mark. As such, confusion is unlikely between the cited mark and Applicant's KAMEO goods, which do not include board games or card games and which are expressly limited to goods sold to promote Applicant's videogames and videogame characters.
(Brief, p. 3)

We find that, at a minimum, the toy action figures and hand-held units for playing electronic games identified in applicant's application are sufficiently related to registrant's goods as set forth in the registration, and that confusion is likely to result from the use thereon of the virtually identical marks in this case.³ As noted, for purposes of our likelihood of confusion determination, we must consider the goods recited in registrant's registration, namely, equipment sold as a unit for playing a board game. Registrant's goods and applicant's toy action figures and hand-held units for playing electronic games are all in the nature of toys and games. These kinds of goods are sold in the same channels of trade, such as

³ It is enough that there is a likelihood of confusion as between the goods set forth in the cited registration and any of the goods identified in applicant's application. See, e.g., *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981).

toy stores and mass merchandisers, to the same class of purchasers, namely, the general public. See CBS Inc. v. Parkville Imports, Inc., 223 USPQ 1143 (TTAB 1984) [likelihood of confusion between TROUBLE for a board game and TROUBLE dolls for dolls presumed, in absence of restrictions in identifications, to travel through the same channels of trade, namely, gift, department and toy stores.]

Further, with respect to the relatedness of the goods, the evidence of record includes copies of four third-party registrations which include in their respective identifications of goods, inter alia, equipment sold as a unit for playing a board game, on the one hand, and toy action figures and hand-held units for playing electronic games, on the other hand. Although these registrations are not evidence that the marks shown therein are in use; or that the public is familiar with them, they nevertheless are probative evidence to the extent that they suggest that the goods identified therein are of a type which may emanate from a single source under a single mark. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993); In re Mucky Duck Mustard Co., Inc., 6 USPQ2d 1467 (TTAB 1988). We find that this evidence, although not overwhelming in terms of quantity, is probative evidence of

the requisite relationship between applicant's toy action figures and hand-held units for playing electronic games and registrant's equipment sold as a unit for playing a board game.⁴ In addition, applicant's jigsaw puzzles, marbles and playing cards can generally be considered similar to a board game, in that all are diversions that can be engaged in on a tabletop or other similar surface.

We are not compelled to reach a different result here because applicant intends to sell its goods "to promote applicant's videogames and videogame characters." This language in applicant's identification of goods does not serve to limit the channels of trade or classes of purchasers of applicant's goods, and is only a statement of the business purpose behind applicant's intention to market the goods under the mark. In other words, applicant's goods may still be sold in toy stores and mass merchandisers to the general public. Neither does the language restrict the manner in which the goods may be sold, that is, applicant is not limited to selling its goods alongside or in conjunction with its videogames. Rather, applicant's toy action figures, for example, may be

⁴ We also note that applicant's "model craft kits of toy figures" are items similar in type and utility to action figures, and would encompass model kits used to make model action figures.

sold in the "action figure" section of a toy store. In short, applicant's purported limitation does not obviate the likelihood of confusion in this case.

Two additional matters require comment. As noted, applicant contends that registrant actually uses the CAMEO mark as the name of a card in registrant's "Cranium" board game, rather than on the goods set forth in the registration. Applicant is advised that it may seek a restriction under Section 18 of the Trademark Act, 15 U.S.C. §1068. This remedy is available for those who believe that a restriction in the cited registration may serve to avoid a likelihood of confusion. See *Eurostar Inc. v. Euro-Star Reitmoden GmbH & Co. KG*, 34 USPQ2d 1266 (TTAB 1994). Section 18 specifically permits the USPTO in opposition and cancellation proceedings to "modify the application or registration by limiting the goods or services specified therein."

Also, applicant argues that the cited mark is descriptive of a feature of registrant's board game in that players of the game, who draw a "cameo" card, are required to give a short performance in which they act out a clue. Applicant's contention that the mark in the cited registration is descriptive of the goods is a collateral attack on the validity of such registration and will not be

entertained in this ex parte proceeding. See TMEP Section 1207.01 (c)(iv) (2005) and cases cited therein.

In view of the foregoing, we conclude that consumers familiar with registrant's mark CAMEO for equipment sold as a unit for playing a board game, could reasonably assume, upon encountering applicant's virtually identical mark KAMEO for related toys and games, and for toy action figures and hand-held units for playing electronic games, in particular, that such goods emanate from, or are sponsored by or affiliated with the same source.

Decision: The refusal to register is affirmed.